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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 558

JAMES M. PENNINGTON, *et al.*,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

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BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

OPINIONS BELOW

Petitioners accurately note (Pet. 2) the Sixth Circuit's Opinion is as yet unreported and is printed in Appendix A to the Certiorari Petition, pp. 1-28. The Petition accurately recites the District Court's Opinion, reported in 257 F. Supp. 815, appears in the Certified Record (138-253a).[1]

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[1]The United States Court of Appeals for the Sixth Circuit is referred to herein as "Sixth Circuit".

The United States District Court for the Eastern District of Tennessee, Northern Division (at Knoxville) is referred to as "district court".

Page references are to the Joint Appendix and Supplemental Appendix in the Sixth Circuit and filed as part of the Certified Record in this Court's Clerk's office. The abbreviation "Pet." refers to the Petition for Writ of Certiorari and "Pet. App. A" refers to Appendix A to said Petition.

JURISDICTIONAL GROUNDS

The jurisdictional requisites are adequately set forth in the Petition (p. 2).

STATUTES AND RULES INVOLVED

The statutory provisions involved are Sections 1 and 2, Sherman Antitrust Act (15 USCA 1, 2); Sections 4 and 6, Clayton Act (15 USCA 15, 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); and the Labor Management Relations Act, 1947 (29 USCA 141, 151, 157 and 158). Petitioners erroneously include (Pet. 2) the National Employment Act (15 USCA 1021).

Also involved is Rule 52(a), Federal Rules of Civil Procedure.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

UMW does not accept the statement of Questions Presented, as set forth in the Petition (p. 3). In lieu thereof, UMW submits the following:

1. Did the Sixth Circuit and the district court properly hold that under this Court's *UMWA* v. *Pennington*, 381 U.S. 657, proof of a conspiracy between employers and labor formed with the intention of driving competitors out of business is essential to a finding that a labor union has violated the Sherman Antitrust Act?

2. Did the Sixth Circuit and the district court properly hold that predatory intent or the anticompetitive conspiracy must be established by clear proof, under guidelines of both *UMWA* v. *Pennington*, 381 U.S. 657, and *UMWA* v. *Gibbs*, 383 U.S. 715?

3. Did the Sixth Circuit and the district court, under applicable law and the evidence, properly hold that the Protective Wage Clause contained in the National Bi-

tuminous Coal Wage Agreement of 1950, as Amended Effective December 1, 1958, did not constitute a violation of the Sherman Act.

4. Was the Sixth Circuit's affirmance of the district court's dismissal of the antitrust claims proper under Rule 52(a), Federal Rules of Civil Procedure?

COUNTERSTATEMENT OF THE CASE

A. The Kind of Action and the Judgments Appealed.

Petitioners are seven coal companies,[2] sued by Trustees of the United Mine Workers of America Welfare and Retirement Fund to recover money judgments for delinquent royalties as signatories to the National Bituminous Coal Wage Agreement of 1950, as amended, each of which filed a cross-claim against United Mine Workers of America,[3] and Dean Coal Company which filed an original action against UMW under the Sherman Antitrust Act (15 USCA 1, 2), based upon an alleged conspiracy between UMW and major coal companies (not parties hereto) to force small coal companies out of business.

UMW denied the conspiracy charges; asserted all such agreements were obtained by its independent efforts, acting unilaterally and in its own self-interest, free of alliance or combination with an employer or groups of employers for a predatory anticompetitive purpose, and that its acts were motivated by legitimate labor goals to secure uniformity of union standards of wages and working conditions for its members; and alleged that

[2]The seven coal companies are James M. Pennington, et al.; Harry P. Stansberry, t/a Stansberry Coal Company; Jesse C. and Nola Fesler, t/a Fesler Coal Company; U. R. and Mrs. U. R. Arnold, t/a Arnold Strip Mining Company, a partnership, and Arnold Coal Company, Inc.; Tennco, Inc.; E. C. McPherson, t/a E. C. McPherson Coal Company; and M. W. Norquest and E. C. McPherson, t/a McPherson Coal Company.

[3]Called "Fund" and "UMW", respectively.

by virtue of *Clayton's* Sections 6 and 20 (15 USCA 17, 29 USCA 52) and the Norris-LaGuardia Act (29 USCA 101, *et seq.*) the negotiation and execution by UMW of its agreements and its conduct in connection with their enforcement do not constitute a *Sherman* violation.

Petitioners accurately note this Court's 1965 delineation of guidelines (herein discussed, *post*, pp. 4-6) in *UMWA* v. *Pennington*, 381 U.S. 657, 672, which reversed and set aside a jury verdict and judgments against UMW, and remanded the case for retrial consistent with Mr. Justice White's opinion.

Upon remand and upon motion by Petitioners, the *Pennington* case was consolidated for trial with the remaining seven cases and, by agreement, tried by the district court without a jury. In a written Memorandum Opinion (138a) by District Judge Robert L. Taylor, the court found that Petitioners failed to prove UMW engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states, as alleged in the complaint (239a). The Sixth Circuit affirmed (Pet. App. A 17). While Petitioners correctly observe the Sixth Circuit affirmed judgments of the district court (Pet. 2), they fail to advise this Court that such affirmance related only to judgments in Case No. 17,445—the antitrust claims (Pet. App. A 16); but upon UMW's appeals the Sixth Circuit reversed the district court's award of costs to Petitioners who had failed to prevail in their antitrust claims involved in Cases Nos. 17,446 through 17,451 (Pet. App. A 28).

B. This Court's Guidelines in *Pennington*.

In *Pennington*, this Court delineated, in its majority opinion, guidelines for decision of the antitrust phase.

It held it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the anti-trust laws and . . . may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers" and no case under *Sherman* "could be made out on evidence limited to such union behavior" (381 U.S. 665).[4] It avowed:

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union"

and, further,

> "The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy" (p. 665, fn. 2).

Underlying Pennington's premise is recognition that "a legitimate aim of any national labor organization is to obtain uniformity of labor standards" and, as *Apex Hosiery Co. v. Leader*, 310 U.S. 469 held, "a consequence of such union activity may be to eliminate competition based on differences in such standards" (381 U.S. 666).

Pennington recognizes that ". . . a union forfeits its exemption from the anti-trust laws when it is *clearly shown* that it has agreed with one set of employers to

[4]The premise is emphasized by Mr. Justice White's further statement: ". . . a union may make wage agreements with a multi-employer bargaining unit and *may in pursuance of its own union interests* seek to obtain the same terms from other employers" (381 U.S. 665). [All emphases are supplied, unless otherwise indicated.]

impose a certain wage scale on other bargaining units" (381 U.S. 665). This precedes the significant statement that "One group of employers may not conspire to eliminate competitors from the industry *and the union is liable with the employers if it becomes a party to the conspiracy*" (p. 665-66).

C. This Court's Guidelines As to the Standard of Proof.

Forfeiture of a union's exemption from antitrust laws, Mr. Justice White stated, results only *"when it is clearly shown"* the union has entered into an extra-unit agreement. Subsequently this Court held in *UMWA* v. *Gibbs*, 383 U.S. 715, that *Norris-LaGuardia's* Section 6 conditions a union's responsibility in a federal court for unlawful actions of its officers, members or agents upon *"clear proof"* of the union's actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

D. Both the Sixth Circuit and the District Court Agreed on *First Pennington's* Requirements to Prove a *Sherman* Violation.

The Sixth Circuit agreed with the district court's holding that *first Pennington* requires a conspiracy between employers and labor formed with the *intention* of driving competitors out of business in order to find a *Sherman* violation; that predatory intent as used in *first Pennington* is merely shorthand, employed to describe this anti-competitive conspiracy; and such conspiracy must be established by clear proof.

E. The Sixth Circuit Agreed With the District Court That Petitioners Failed to Prove a *Sherman* Conspiracy.

Implementing *Pennington* and *Gibbs* guidelines, the district court found Petitioners "failed to prove, either

by a preponderance of the evidence or by the standards of evidence" established in *Gibbs* that UMW engaged in a conspiracy (239a). To Petitioners' argument that the conspiracy's inception occurred with execution of the 1950 Agreement, the district court found (231a) "The 1950 negotiations were carried on under the surveillance of the National Labor Relations Board and the Court, two injunctions having been issued, one at the instance of the NLRB and the other at the instance of the Department of Justice. The injunction directed the Union and the operators to bargain in good faith" and the district court observed, "It would seem a bit unusual that the Union and the operators who had been fighting each other for some fifteen years would enter into a conspiracy to violate the antitrust laws" (174a).

It found that "Ten witnesses, each of whom was in a position to know, testified positively that there was no predatory price fixing" and that "Included in this list were UMW officials who likewise denied any participation in any alleged price fixing (237a).

The district court found, and *Petitioners did not challenge its findings,* that UMW investments and loans in West Kentucky Coal Company and Nashville Coal Company "were for organizational purposes" (189a). It stamped as insufficient the proof to establish the claim that West Kentucky or any other coal operator bid on TVA coal to depress coal prices on the TVA market and thereby drive small coal operators, including Petitioners, out of business; or that "UMW, by arrangement, combination or otherwise, influenced or attempted to influence" West Kentucky or any other operator in bidding for coal on the TVA market (238a); or that West Kentucky or any other operator by arrangement fixed

the price or attempted to fix coal prices on that market (237a). It declared West Kentucky prices appeared to have been a matter of "sound business judgment" and "not evidence of predatory pricing" (225a). Of these findings, the Sixth Circuit declared, "These findings are supported by evidence in the record and are not clearly erroneous (Pet. App. A 12-13). *Significantly, Petitioners did not in the Sixth Circuit, and do not in this Court, attack these district court findings relating to the TVA market as being without evidentiary support.* The Sixth Circuit concluded that by the required standard of clear proof "evidence of sufficient probity had not been offered" and that such district court determination "is supported by a review of the record and is not clearly erroneous."

In conclusion, the Sixth Circuit found the district court properly dismissed the complaint on the ground that Petitioners failed to prove "that defendant engaged in a combination of conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged . . ."

F. The Sixth Circuit and the District Court Alike Rejected Petitioners' Contention That PWC Constituted a *Sherman* Violation.

The district court found that by PWC's Paragraph A., "UMW only obligates itself for full compliance of the terms of the contract *by the 'parties signatory thereto'*" (235a) and Paragraph B. "manifests an intention to protect the continuity of work of the employees against the practice of employers procuring from others by land-lease, subcontract or otherwise coal that was produced under terms and conditions less favorable than those provided in the contract with the Union" (235a).

The Sixth Circuit sanctioned the district court's interpretation of the PWC in the 1958 Agreement, holding that PWC, properly construed, did not require UMW to impose the 1958 Agreement's wages on non-signatory employers; it approved the district court's implementation of the legal principle which held that PWC is "capable of two reasonable constructions," and that construction should be adopted which does not result in a violation of law (Pet. App. A 17). The Sixth Circuit further held that "even without the operation of this principle of law we would incline to the conclusion that the agreement did not constitute a violation of the Sherman Act, the record containing insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown."

Contrary to Petitioners' *implication* (Pet. 19) that UMW sought, by violence, to impose the 1958 Agreement's terms upon east Tennessee coal operators, the district court found that such conduct "is insufficient to show a Sherman Act antitrust violation" (239a). Petitioners did not in the Sixth Circuit, nor do they in this Court, challenge that finding or the district court's further finding as to Paragraphs A. and B.

THE FACTS

A. Unchallenged Denials of a Conspiracy.

No witness and no documentary evidence showed UMW conspired with any non-labor group; and positive unchallenged denials by UMW and company officials alike show there was no conspiracy.[5] Indeed, the district court found, *without complaint by Petitioners in the Sixth Circuit* or in this Court that "Ten witnesses, each

[5] 781a, 1308a, 1356-57a, 1404a, 1407a, 1409a, 1420a, 2114-15a, 1776a,

of whom was in a position to know, testified positively there was no predatory price fixing" (237a).

B. UMW's Historic Policy for National Uniformity of Labor Standards.

From its origin as a labor union in 1890, UMW has striven for national uniformity of wages and working conditions. UMW Conventions through the years mirror authoritative expressions to this policy.* An operator's geographical or economic situation does not alter the labor the miner expends or the wherewithal he and his family need to live decently (1331a, 1364-65a). UMW experiences show that wage-cutting to reduce cost and prices by one operator induces a cycle of wage cutting by other operators which results in progressively depressing wages until it reaches the lowest level that is payable (1545-46a, 1363a). In 1941, the National Defense Mediation Board, taking note of UMW's historic policy, observed that day-wage uniformity had been disrupted by the industry's chaotic condition between 1924 and 1933, and recommended elimination of the 40-cents north-south differential, concluding that the increased labor cost entailed in eliminating the differential is not sufficient to justify the Board's recommendation that the differential be maintained to preserve existing fair competitive opportunities (1585a; S.A. 2298a). From 1941 to the present there has been almost complete uniformity of wage rates for day-men and a flat across-the-board wage increase given to the piece-worker has been equal in amount to the increase given the day-worker (1368a). Though differentials still exist, over all UMW accomplished its historic policy of wage uniformity.
1777-78a.

*1539a, 1540a, 1542a, 1547a, 1549a, 1552-55a, 1558a, 1559a.

C. UMW's Authority to Negotiate a Collective Bargaining Contract Derives From Its Members.

UMW's authority to negotiate a collective bargaining agreement derives from its membership, granted at its Conventions. Only the Policy Committee may approve a contract for execution. Contrary to Petitioners' statement (Pet. 12), undisputed evidence shows UMW is free to negotiate a labor agreement at variance with the National Agreement.[7] Although each change would have to have the Policy Committee's sanction, every item of the contract was negotiable. But Tennessee operators "would not sign a contract; they would not offer anything in lieu thereof" except what UMW regarded "impossible"; they wanted no pension program and only a limited hospitalization program; and they wanted to eliminate benefits coal miners in that area had enjoyed over 20 years in UMW's contract (1898-99a).

D. BCOA's Formation Was Unrelated to the 1950 Agreement.

As already noted (*ante*, pp. 6-8), neither in the Sixth Circuit nor in this Court do Petitioners' challenge the district court's rejection of Petitioners' contention that the 1950 Agreement resulted from a conspiracy.

It is undisputed that UMW had nothing to do with the formation of Bituminous Coal Operators Association (BCOA), formed as an unincorporated group on July 22, 1950 (1356a, 1769a, 2181-82a). Open to all operators, large or small, when formed BCOA represented 262 individual coal companies producing 50 per cent, or more, of the tonnage (1771-72a). One-half of its companies mined less than 100,000 tons a year (1771a). Of alleged co-conspirators, Consolidation Coal Company and Pittston Coal Company alone were BCOA members. Neither

[7] 1296a, 1407a, 1777a, 1927-28a.

West Kentucky nor Nashville Coal was a member (S.A. 2315; 2144a).

E. Increased Labor Costs in the Post-1950 Period Resulted From Arms-Length Collective Bargaining.

Whereas Petitioners assert (Pet. 13) that amendments to the National Agreement "steeply increased the labor costs in the coal industry", undisputed evidence shows that in the 14-year period following the 1950 Agreement's execution, wages increased $11.50 per day, with a 10-cent royalty increase in 1952 [which has since remained unchanged (1313a)]; and that average weekly earnings in the bituminous coal industry were $133.27, compared with $137.70 in the motor vehicle industry and $138.77 in the steel industry (2266a). In the 8-year period of 1958-64, coal miners had increases of $2.00 in each of the 1958 and 1964 Agreements, amounting to 6¼ cents per hour (1410a). Indeed, when the miner's 1941 take-home pay is compared with that in 1964, and the purchasing power is given consideration, the miner has 10 cents less under his 1964 wage scale than he had in 1941 (1410a).

Asked if successive wage rate increases were "designed to meet the increased ability" of large companies to pay them, UMW's President stated, *"mine workers had no relation to those elements of consideration"* and *"The mine worker was merely not getting a compensatory rate for his services in an ultrahazardous industry, affected with much unemployment; and that was the sole consideration of the United Mine Workers"* (805a). UMW was representing the interests of UMW members and was not concerned with what the operators would do as affecting those questions over which the UMW had no jurisdiction (808a).

F. Competition of Coal With Competitive Fuels Necessitated Greater Mechanization.

While Petitioners assert that wage agreements since 1950 were tailored to fit the new technology of intensive mechanization, favored by geology and better mining conditions (Pet. 13), historically mechanization was a competitive medium employed by coal operators prior to and after 1900, and a normal procedure long prior to 1950 when Petitioners assert the alleged conspiracy was made.[6] Mechanization was not an issue in the negotiations preceding execution of the 1950 Agreement (1767a).

The coal industry turned to improved mechanization as competitive fuels displaced coal. In 1940 coal provided 47.2 per cent of total fuel energy consumed in the United States, as compared with 43.8 per cent provided by crude oil, petroleum and natural gas; but by 1950 coal's share had dropped to 34.8 per cent and the share of crude oil, petroleum and natural gas had increased to 57.5 per cent (2277a, 2027-29a)—a trend which has continued until in 1964 coal's share was reduced to 21.8 per cent, while the other fuels' share had increased to 73.8 per cent (2277a). Coal had to be concerned about external competitive forces.

Through increased mechanization, in 1961 the American miner averaged 12 tons a day, compared with 5-6 tons in 1940 (1713a, 2036a). In 1964, the average increased to 16.84 tons per man (2036a), and in Tennessee the average in 1940 was 3.38 tons; in 1950, 4.67 tons; and in 1964, 10.15 tons (2039a).

Had the coal industry not increased productivity through greater mechanization with its attendant lower-

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[6] 995a, 1706a, 1042-43a, 1774a.

ing of costs, it would have succumbed to its competitors, such as oil, gas and diversified fuels made from coal or petroleum bases (1706-07a). UMW has never opposed mechanization, not because of any conspiratorial arrangement, but because of UMW's belief in the free enterprise system which recognizes that investment for profit may endure only through increased productivity, and the belief that mechanization is a management prerogative to buy such equipment as management chooses and UMW does not attempt to abridge it (1304a, 1706a, 1709a).

G. The PWC in the 1958 Agreement Was a Labor Standards Clause Protecting UMW Members' Work Opportunities and Standards.

The Protective Wage Clause (PWC) had its genesis in 1943 contract negotiations when UMW sought, and the National War Labor Board directed, that each agreement contain a clause to protect the contract and preserve the interests of the miners. It read: *"operators agree that they will not let any operating mines subject to this agreement as a subterfuge"* to avoid the Agreement's provisions. A labor agreement, negotiated by the Secretary of the Interior and known as the Ickes-Lewis Agreement, contained an identical clause (2128a, 2130a). Subsequent agreements negotiated annually from 1943 through 1951 carried the anti-lease clause (2130-32a).

The clause was expanded in the 1952 amendment to the 1950 Agreement when signatory operators agreed that:

> "operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this

agreement) be put into production. *The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement"* (1688-89a, 2132a).

This same language was carried forward in the 1955, 1956 and 1958 Agreements (2132a).

For six years following the 1952 Agreement's execution, UMW believed signatory operators were "chiseling" on the contract (2133a).

During negotiations for the 1958 Agreement, UMW proposed and BCOA *rejected* a protective wage clause. A revised proposal on November 25, 1958, accompanied a letter setting forth the clause's purpose and the reasons therefor: ". . . it has become mandatory that the union find a way in which to protect its members employed in the . . . industry against the ever-encroaching evils and practices of sub-contracting, the production and procurement of coal not mined in accordance with the wage scales and other terms and conditions of the national agreement, and other companion evils flowing therefrom" (2134a). Continuing, the letter recited: "Sub-contracting by signatory operators is nothing more than pure evasion of their contractual obligation to pay and maintain the agreed standards of wages and . . . . vitally affects our members because it progressively undermines our members' tenure of employment and results in removing and withdrawing from them more and more work and hence more and more jobs are lost to them" (2134a). The letter charged, "many signatories of the present national agreement, indeed members of your own association, have been, and presently are, guilty of such nefarious practices", thereby becoming assisting parties "to those who seek to debase and

lower our standard of wages, hours, safety requirements, work opportunities and other benefits" which UMW members are entitled to have protected (2134-35a).

Agreement reached on PWC required coal mined, produced, prepared, procured or acquired by signatory operators shall be mined under labor standards as favorable to employees as those in UMW's contract (2242a). Lewis announced that labor standards and job opportunities to which UMW members are contractually entitled have been achieved after long years, and UMW seeks to safeguard these by PWC (2136a). Reluctantly, BCOA agreed to avoid an interruption in the supply of coal (2137-38a).

Operators complained the union was not enforcing contracts already signed among particular signatories (1403a), causing them to ask UMW for a reciprocal contractual commitment, and UMW's senior counsel testified that UMW acquiesced it would enforce the Agreement *as to all signatories thereto equally* (2185-86a).*

PWC was not to become effective until April, 1959. It was never enforced (2079a). Originally delayed by mechanics of setting up the Joint Industry Contract Committee (JICC), created by PWC, its activities were suspended on November 4, 1959 because of doubt concerning its legality under the Landrum-Griffin Act which barred "hot cargo" clauses (2138a). PWC was specifically eliminated from the 1964 Agreement dated March 23, 1964 (1283a). JICC was dissolved March 31, 1964 (2082a).

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*The district court noted that Senior Counsel Welly K. Hopkins so testified and that neither Paragraph affected anyone except those signatory to the contract. The district court observed that "This testimony would only be competent if the contract is ambiguous" and that "both parties" agree "the contract is not ambiguous" (236a).

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

A. The Instant Case is Not One of First Impression on the Application of Antitrust Law to Industry-wide Bargaining.

Contrary to Petitioners' assertion, "This is the case of first impression on the application of antitrust law to industry-wide bargaining" (Pet. 20), the first question posed in the certiorari petition in *first Pennington* was "May a labor union be held a conspirator under the Sherman Antitrust Act where it has achieved an industry-wide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?" *First Pennington* was responsive thereto.

B. Congress Has Repudiated Petitioners' Contentions Concerning Industry-wide Bargaining.

Review of the certiorari petition demonstrates Petitioners' assignments of reasons for granting the writ (Pet. 20), in the main, pertain to a criticism of industry-wide bargaining. However, Congress itself has rejected the thesis now pressed by Petitioners. Legislative debates in connection with Congress' enactment of the Labor Management Relations Act, 1947, demonstrate Congress' refusal to interfere with industry-wide and multi-employer bargaining.[10] Indeed, *NLRB* v. *Truck Drivers Union*, 353

[10] Legislative History of the Labor Management Relations Act, 1947 (U. S. Government Printing Office, 1948), Vol. I, pp. 326, 457, 584, 636, 643, 673, 715, 758, 760, 764-65; Vol. II, pp. 970, 1037, 1038, 1059, 1271-73, 1299, 1301-02.

Parks v. *IBEW*, 4 Cir., 314 F.2d 886, states (p. 906-07), "A strong provision prohibiting industry-wide bargaining was passed in the House" but eliminated from the Senate Bill; and attempts to reinstate the House provisions were defeated.

U.S. 87, 95, judicially records such refusal, noting that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations." Congressional debates are clear its refusal related to industry-wide bargaining.

Again, in 1959, legislative debates in connection with the Labor-Management Reporting and Disclosure Act of 1959 reflect Congressional determination not to interfere with industry-wide collective bargaining, by refusing to adopt proposals that the immunity accorded labor unions be excised from antitrust laws. Precisely the same arguments now directed by Petitioners are found in the legislative debates. However, there was opposition to such legislation, and Congress rejected the anti-labor proposals.[11] Thus, Petitioners' request that this Court condemn industry-wide agreements is to ask this Court to approve by judicial fiat what Congress refused to enact into legislation. Judicial acquiescence in such request is interdicted by *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355, 363-64, where it is said that, "The emasculation of the contract pressed for by the Board in order to achieve that which Congress refused to enact into law cannot be sustained."

First Pennington acknowledged the current efficacy of labor's exemption from the antitrust laws. Petitioners' proposal (Pet. 20) that this Court reach a result in light of reports before Congress, invites the admonition in *United Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 153, that these "are decisions which we believe suited to the legislative and not the judicial branch."

[11] Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Government Printing Office, 1959), Vol. II, pp. 1941-42, 1690, 1508, 1717, 1747, 1748, 1837, 1189-90, 1320, 1809. See Appendix B for excerpts from the legislative debates.

Previous refusals on Congress' part to affect the current immunity of labor unions from the antitrust laws renders the *Bouligny* language particularly apt.

C. Both the Sixth Circuit and the District Court Properly Applied This Court's Guidelines Enunciated in *First Pennington*.

Contrary to Petitioners' assertions (Pet. 12, 20), the Sixth Circuit sanctioning the district court's holdings, correctly appraised *first Pennington* teachings to be (1) that a conspiracy between employers and labor formed with the intention of driving competitors out of business is a *Sherman* violation; (2) that "predatory intent" as used in *first Pennington* and by the district court "is merely shorthand, employed to describe this anti-competitive conspiracy" and (3) that such an anti-competitive conspiracy must be established by "clear proof," directing attention to *Gibbs*, 383 U.S. 715 (Pet. App. A 16). The Sixth Circuit and the district court clearly followed this Court's mandate in *first Pennington* as the following discussion shows:

1. The Lower Courts Correctly Determined That an Anticompetitive Conspiracy is Essential to a Sherman Violation.

In the Sixth Circuit, Petitioners contended the district court erred in concluding that *first Pennington* made it essential "to find predatory intent to drive small coal operators out of business in order to hold the employer and Union for a" *Sherman* violation.

First Pennington, 381 U.S. 664, continued to recognize, as *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, enunciated, that restraints on sale of employees' services are not commercial restraints outlawed by *Sherman* (pp. 502-03), a result stemming from Congressional immun-

ity accorded labor unions under the Clayton Act's Section 6 (15 USCA 17) which avows that "The labor of a human being is not a commodity or article of commerce", that antitrust laws do not "forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof" and that labor unions are not to be "construed to be illegal combinations or conspiracies in restraint of trade" and, as *first Pennington* states (p. 661), from *Clayton's* Section 20 and *Norris-LaGuardia's* Section 4.[12]

First Pennington, 381 U.S. 661, like *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, reiterated the pronouncement in *U. S.* v. *Hutcheson*, 312 U.S. 219, that the Sherman, Clayton and Norris-LaGuardia Acts must be jointly considered as "interlacing" statutes in determining whether labor union activities run counter to antitrust legislation and that "Conduct which they permit is not to be declared a violation of Federal law" (p. 806).

Allen Bradley made clear a collective bargaining agreement "standing alone" would not violate *Sherman*, and *first Pennington* adhered thereto. Under *first Pennington*, "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers" and "No case under the antitrust laws could be made out on evidence limited to such union behavior" (381 U.S. 665). Similarly, footnote 2 recites that:

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform

[12]See Appendix A hereto for the full text of *Clayton's* Section 6 and other relevant statutes. Other statutes involved are printed in the certiorari petition, Appendix B, at pages 35-40.

> wage policy; and seek vigorously to implement it . . . The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay" (381 U.S. 665, fn. 2)

and that

> "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy . . ."

The condemned element, which Justice White states must be *clearly shown* to effectuate the forfeiture, is expressed in the two sentences following the forfeiture statement and constitute the yardstick for the forfeiture: "One group of employers may not *conspire to eliminate competitors from the industry and the union is liable if it becomes a party to the conspiracy*" even "though the union's part in the scheme is an undertaking to secure the same" labor standards from the remaining employers in the industry (381 U.S. 665-66).

Pointing to the quoted language, the Sixth Circuit declared (Pet. App. A 15), "Justice White thus says in effect that if a union and some employers *conspire to eliminate some or all of the employers' competition,* this is a violation of the Sherman Act even if the mechanism is the imposition of a wage scale which the union is free unilaterally to impose." The Sixth Circuit then observed that it was on this premise—*i.e. that the bargaining agreement's purpose* "was to drive some employers out of business"—that Justice Douglas, joined by Justices Black and Clark, concurred, saying (381 U.S. 672-73):

> "On the new trial the jury should be instructed that *if there was an industry-wide collective bargain-*

> *ing agreement whereby employers and the union agreed on a wage scale* that exceeded the financial ability of some operators to pay *and that if it was made for the purpose of forcing some employers out of business,* the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws."[13]

This coincided with the district court's interpretation of Justice Douglas' concurring opinion where the trial court stated, "in order for an employer and a union to be guilty of violating the antitrust laws, the industry-wide agreement must exceed the financial ability of some operators to pay and *it must be made for the purpose of putting some employers out of business*" (166-67a).

Other recitals in Justice White's majority opinion support both the Sixth Circuit and the district court in their avowals of the necessity of proof of predatory intent or anticompetitive agreement. In denouncing employer-union conduct designed to eliminate a favored employer's competitive interest, as distinguished from an interest in regulating labor relations, Justice White noted, "The *anticompetitive potential* of such a combination is obvious, but is little more severe than what is *alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry*" (381 U.S. 668). Further, while Justice White made clear his opinion did not relate to the evidence's sufficiency (381 U.S. 665, fn. 2), but dealt only with the complaint's allegations, in sanctioning the denial of UMW's dismissal

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[13]Notably, Justice Douglas read the crux of *Pennington* to be "If the allegations in this case are to be believed, organized labor joined hands with organized business *to drive marginal operators out of existence*" (381 U.S. 674). Petitioners *assiduously avoid* including this factor in their certiorari petition (p. 2).

motion, Justice White noted the *allegation* was the union became a party to *a collusive bidding arrangement designed to drive operators from TVA's spot market* (381 U.S. 663). It is to this collusive, anticompetitive type of agreement that Justice White alludes in his statement that "*all such agreements* between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case" (381 U.S. 668). It is thus evident that Justice White's reference to "*such agreements*" embodies the concept of a collusive, anticompetitive agreement involvement which, if clearly proved—and only in such an event—would effect a forfeiture of a union's exemption from the antitrust laws, as *first Pennington* recited (381 U.S. 665).

2. The Sixth Circuit Properly Approved the District Court's Standard of Proof Required in Antitrust Cases.

In *first Pennington,* Justice White's opinion required *clear proof* to effectuate a forfeiture of the exemption Congress gave to labor unions from the antitrust laws (381 U. S. 665).

The district court concluded (167a), "The standard of proof necessary to show predatory intent is governed by *Gibbs* (383 U.S. 715, 736) wherein this Court mandated the implementation of *Norris-LaGuardia's* Section 6 to union conduct and recognized it is applicable in antitrust cases.

The Sixth Circuit found the district court "properly concluded that a degree of proof less than the 'beyond a reasonable doubt' requirement in criminal cases but greater than the 'preponderance of the evidence' standard of civil actions is necessary" to prove the anticompeti-

tive conspiracy (Pet. App. A 16). The Sixth Circuit's imprimatur of the district court's standard of evidence is consonant not only with *first Pennington's* clear proof requirement, but also with *Hutcheson's* command that *Sherman, Clayton* and *Norris-LaGuardia* be interpreted as "interlacing statutes" (312 U.S. 219). It blends with *first Pennington's* avowal concerning "harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation' " (381 U.S. 665).

3. Effects and Consequences May Not Be Substituted For A Conspiracy Under The Sherman Act.

Contrary to Petitioners' statement (Pet. 8) that the district court did not consider "the drastic effects throughout the whole industry", the district court held, "Justice White's Footnote No. 2 indicates that the anti-trust law is not designed to protect marginal operators; that *ill effects alone* on the marginal operators is not enough to show intent" (167a).

Petitioners' real complaint is that UMW should have abandoned its historical policy of uniformity, resorted to regional bargaining and acceded to Petitioners' demand that they be subsidized at the expense of coal miner members of UMW and thus afford coal producers in Tennessee a competitive advantage over their competitors—a complaint which *first Pennington* rejects.

It is evident that the crux of Petitioners' complaint is the refusal of both the district court and the Sixth Circuit to accept Petitioners' position that *effects and consequences* of the National Agreement to which multiple employers became signatory may be *substituted* for

conspiracy as the essential ingredient of a *Sherman* violation (Pet. 4, 8, 9, 20, 21), a view UMW asserts is contrary to *first Pennington.* Such substitution would completely strip of meaning Justice White's avowals that unilaterally a union may adopt a uniform wage policy and seek vigorously to implement it and the union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Petitioners' premise would render meaningless Justice White's further unequivocal statement that "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act" and "There must be additional direct or indirect evidence of the *conspiracy*" (381 U.S. 665).

Since UMW can implement its wage policy only by collective bargaining and ultimately by agreement with multiple signatory operators, all permissive under national labor policy as willed by Congress and judicially sanctioned in *first Pennington,* to adjudge its conduct in light of effect and consequences is to render a union's immunity from *Sherman* as wholly illusory. Clearly, no inference of conspiratorial conduct may be derived from activities permitted by national labor policy. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (312 U.S. 219, 232) forbids a finding of conspiracy from permissible conduct. Indeed, *Allen Bradley* (325 U.S. 806) proclaims that conduct permitted by federal statutes "is not to be declared a violation of Federal law". Accord: *The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.,* 362 U.S. 330, 339-40. Otherwise, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient

employers which are but the by-product of UMW's pursuit of a uniform wage policy in the interest of its members.

In claiming the lower courts failed to implement *first Pennington,* it is obvious *Petitioners refuse to recognize the immunity Congress accorded labor unions* under antitrust laws. Results reached in cases decided since *first Pennington* which involved such exemption abundantly pinpoint the fallacy in Petitioners' contentions and demonstrate affirmatively the Sixth Circuit and the district court alike properly implemented *first Pennington's* guidelines. See *Cedar Crest Hats, Inc.* v. *United Hatters, Etc. Union,* 5 Cir, 362 F.2d 322; *Carroll* v. *American Federation of Musicians, etc.,* DC, S.D. N.Y., 1965, 241 F. Supp. 865, aff'd 391 U.S. 99 (1968); *Republic Productions, Inc.* v. *American Federation of Musicians,* etc., DC, S.D. N.Y., 1965, 245 F. Supp. 475.

D. The Sixth Circuit and the District Court Properly Rejected Petitioners' Contentions That PWC Violated *Sherman*.

In the Sixth Circuit, as in the district court, Petitioners theorized that by PWC's Paragraph A. UMW "expressly put upon itself a strait jacket which required it to impose upon all bargaining units in which it represented employees, the same terms which it negotiated with" BCOA (105a).

The district court's disagreement with Petitioners' contentions as to both Paragraphs A. and B. have been noted (*ante,* pp. 8-9). The Sixth Circuit agreed (Pet. App. A 17) with the district court that the disputed PWC, properly construed, did not require UMW to impose the wages therein contained on nonsignatory employers. It approved the legal principle that "where

two reasonable constructions of a written contract can be made, preference is given to that construction . . . that does not result in a violation of law," citing *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691 and *Perry Coal Co.* v. *NLRB*, 7 Cir., 284 F.2d 910, 914. *Significantly, Petitioners did not in the Sixth Circuit, and do not in this Court, contend that application of the legal principle employed is erroneous.*

Further, the Sixth Circuit added the observation, "even without the operation of this principle of law we would incline to the conclusion that the agreement did not constitute a violation of the Sherman Act, the record containing insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown" (Pet. App. A 17).

These disagreements with Petitioners' assertions likewise challenge their statement, "it is undisputed that there was the intent to impose terms set by the conspirators on competitors" (Pet. 3, Question 3).

In light of the undisputed evidence herein discussed (*ante*, pp. 14-16) and the total absence of any contradictory evidence in the certiorari petition, it is settled law, *applicable in antitrust cases*, that insofar as a conclusion is based on inferences drawn from documents or undisputed facts, Rule 52(a), Federal Rules of Civil Procedure, is applicable and such findings of fact are not to be set aside unless clearly erroneous. *U. S.* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394.

When it is recalled that the Sixth Circuit concurred with the district court's findings and conclusions regarding PWC's validity, as stated in *U. S.* v. *Johnson*, 319 U.S. 503, 518, it should "take something more than in-

genious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents".

E. Petitioners Seek This Court's Review of Evidence Which Both the District Court and the Sixth Circuit Have Held Did Not Support Their Charge That UMW Conspired in Violation of the Sherman Act.

District court findings with which the Sixth Circuit concurred appear herein (*ante*, pp. 6-9). As already noted (*ante*, p. 27), this Court recognizes that a conclusion based on inferences drawn from documents or undisputed facts in antitrust cases must be affirmed unless clearly erroneous. Since each of the findings had the concurrence of both lower courts, this Court should reject the invitation to review the instant case, implementing its rule that "We do not grant a certiorari to review evidence and discuss specific facts". *U. S.* v. *Johnston*, 268 U.S. 200, 227.

CONCLUSION

Petitioners' "claimed existence" of the conspiracy is to be "found in constant assertion" by them and their counsel *"rather than in the proof." G & P Amusement Co.* v. *Regent Theater Co.*, DC, N.D. Ohio, 1952, 107 F.-Supp. 453, 461. Petitioners' total want of evidence invites a repetition of Judge Medina's admonition in *U. S.* v. *Morgan*, DC, S.D. N.Y., 1953, 118 F.Supp. 621, 634, that *"Either there is some agreement, combination or conspiracy or there is not" and the answer must be found in evidence adduced and not "in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there."*

For the reasons herein discussed, UMW submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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